

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 19, 2008

ALFONZO WATERS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2002-C-1413 Mark J. Fishburn, Judge

No. M2007-01339-CCA-R3-PC - Filed October 1, 2008

The petitioner, Alfonzo Waters,¹ was denied post-conviction relief by the Criminal Court for Davidson County from his conviction for first degree murder and resulting life sentence. He appeals and contends that he received the ineffective assistance of counsel at trial and on appeal. We affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Dwight E. Scott, Nashville, Tennessee, for the appellant, Alfonzo Waters.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The facts of the petitioner's case were summarized by this court on direct appeal:

The defendant was convicted by jury of the [first degree] murder of Charles Beasley. The proof presented at trial established that on April 15, 2002, Latonya Woods, the victim's cousin, was emptying mop water into the alley near her home in the JC Napier housing development in Nashville when she overheard the defendant

¹The petitioner was identified in the indictment as Alfonzo Waters, Jr., a/k/a Alfonzo Waters, a/k/a Alfonzo Massey, Jr. In the judgment of conviction, he was identified as Alfonzo Massey, Jr. a/k/a Alfonzo Waters, Jr. On direct appeal, he was identified as Alfonzo Waters, Jr. We have used his name as it was stated in the amended petition for post-conviction relief.

and several of his friends talking. The defendant was saying, “I ain’t playing today. . . . I ain’t playing, whatever n**ger I see with some mother-f**king red on, it’s on, I’m gonna kill’em. I ain’t bull-sh**ting today.” Later that evening, while the victim was visiting the home of his cousin, Melvin Kimbro, along with a friend, Shawn Brown, the defendant and at least two other men approached and inquired where they were from. Mr. Kimbro answered that he was from Wharf Avenue, and the defendant responded, “Okay. Well, I feel you,” and the group left. At this time, the defendant had a handgun tucked into the waistband of his pants, and the victim was wearing tennis shoes with red shoelaces.

Soon after, the victim and Mr. Kimbro went to Ms. Woods’ house for barbecue. When the two left Ms. Woods’ house with a plate of food, they again ran into the defendant and his companions. Mr. Kimbro told the defendant that they were just trying to get to his house, and they did not want any trouble. The defendant, however, approached the victim and said, “You a slob; aren’t you?” Mr. Kimbro once again told the defendant that they did not want any trouble, and he and the victim continued walking toward Mr. Kimbro’s house. As they were walking away, the defendant pulled out his gun and shot the victim in the back.

Police officers were dispatched to the scene and found “a male black lying on the ground, facedown, [who] had apparently been shot.” The officers worked to control the crowd and set up a crime scene perimeter. Medical personnel arrived and took the victim to Vanderbilt Hospital where he later died. At trial, Mr. Brown identified the defendant as the person he saw with a gun prior to the shooting, and Mr. Kimbro identified the defendant as the person who shot the victim. Also, Mr. Brown, Mr. Kimbro, and Ms. Woods identified the shoes with red shoelaces the victim was wearing the night he was killed.

State v. Alfonzo Waters, Jr., No. M2004-02807-CCA-R3-CD, Davidson County (Tenn. Crim. App. Mar. 16, 2006).

The petitioner sought post-conviction relief on the basis of ineffective assistance of counsel at trial and on appeal. The trial court appointed counsel and conducted a hearing.

At the post-conviction hearing, trial counsel testified that he and the petitioner had good communication before trial, talking “quite a bit” in three-way telephone calls with witnesses and in person. He said the petitioner told him from the beginning of his representation that he shot the

victim in self-defense after the victim hit him with a beer bottle. He said this was the theory presented at trial. He said that he conveyed several plea offers to the petitioner, who rejected them all.

Trial counsel testified that there was conflicting testimony whether the victim had a beer bottle. The state presented witnesses who said the victim did not have a beer bottle and had not been drinking, and the defense presented a witness who said the victim did have a beer bottle. Trial counsel acknowledged that there was a fingerprint report available which reflected that the victim's fingerprints were identified on a Bud Ice bottle but that he did not use this evidence for impeachment of the state's witnesses. He said that his failure to use the fingerprint report in this manner was oversight, rather than trial strategy.

Trial counsel testified that he recognized as hearsay Latonya Woods's trial testimony that the victim had told her about the defendant saying to him, "Dude wanna come up to me talking about any n***** ain't from around here got on red." He admitted that he did not object to this testimony despite this being a reference to gang affiliation and the court having made an earlier ruling that the witnesses were not to mention gangs. Counsel acknowledged that Ms. Woods also testified that the victim told her that the victim and the defendant had words about the victim wearing red and that he did not make a hearsay objection. He admitted he could have moved for a mistrial at this point.

Trial counsel acknowledged that he did not object or move for a mistrial on the basis of evidence of other bad acts of the defendant. He acknowledged Ms. Woods's testimony about the defendant having robbed a group of boys who were shooting dice and Vanessa Page's testimony that the defendant had choked her and that she had seen him carry a gun. He said Ms. Page was the defendant's girlfriend and that the strangling and gun carrying had been either the same day or a day before or after the victim's death.

Trial counsel testified that he became aware after cross-examining Ms. Woods that she had a prior criminal record for aggravated assault. He said he asked but was denied permission to recall her as a witness to inquire about this conviction. He said the basis of the court's denial was that the conviction would not be admissible for impeachment.

Trial counsel testified that he did not make objections to some leading questions because the evidence was ultimately admissible and would be admitted if the questions were rephrased. He said that juries did not like interruptions for repeated objections.

Trial counsel testified that Ms. Woods's testimony was inconsistent with the statement she had given his investigator. He said he did not know why he did not call the investigator as a witness to testify about the witness' prior statement. He said the prior statement implicated the defendant in the victim's murder and could have implicated him as a gang member.

Trial counsel testified that the only issue raised on appeal was the trial court's admission of the evidence about the victim's red shoelaces. He said there were other issues related to hearsay and

prior bad acts that were waived for purposes of appellate review because he had not objected to them at trial. He said he had raised issues in the motion for new trial about references to the color red and the red shoelaces.

Patrick Wells testified that he worked as a private investigator on behalf of the petitioner during the conviction proceedings. He said he interviewed Ms. Woods about a month before trial. Ms. Woods told him that she had seen the petitioner, whom she knew as “ZO” and “Massey,” Fred Webb, Reggie Alexander, and “Shakey” before the victim’s shooting and that the petitioner and Alexander had guns. She told him that she did not witness the shooting but that someone whose identity she could not recall told her the petitioner and the victim had been talking, then arguing, that the victim hit the petitioner with a beer bottle, and that the petitioner shot the victim. He said Ms. Woods did not tell him anything about the victim’s having been at her house earlier in the day and having made statements that the petitioner had called him names and threatened him because he was wearing red. He said he discovered during his investigation that Ms. Woods had a conviction for aggravated assault. He said Ms. Woods’s earlier statements to the police were consistent with her report to him of having seen the petitioner and his three associates and having seen the petitioner with a gun.

The petitioner testified that he met with counsel only on his court dates, although he talked to counsel on the telephone. He said Mr. Wells came to see him in jail. He said he told counsel that the victim hit him with a bottle and that he shot the victim. He said he told counsel that Ms. Woods and other witnesses had criminal records. He said that despite the information he provided, counsel was not prepared for trial.

The petitioner testified that counsel informed him of a twelve-year offer, which the petitioner wanted to accept. He said, however, that counsel “would say they put it off every time” the petitioner asked about it. He said a later offer was for thirty years, which he was unwilling to accept. He said there had also been a twenty-year offer, which he was discussing with his father when a fifteen-year offer was made. He said counsel rejected the offer “straight off the bat” but that he wanted to accept it. He said counsel “was, like, I got you, I got you, don’t worry about this.”

The petitioner testified that counsel told him the state’s witnesses’ criminal records were “clean” even though the petitioner had advised him otherwise. He said that he knew at trial that Ms. Woods had recently shot someone and told counsel again about her criminal record.

After receiving the evidence, the trial court found that although counsel had been deficient in some respects, the petitioner failed to prove that he had been prejudiced. The court denied post-conviction relief.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed

questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner's raising a claim of ineffectiveness to show that counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 104 S. Ct. at 2068. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); see DeCoster, 487 F.2d at 1201.

The petitioner claims that the trial court erred in denying relief based upon his allegations of ineffective assistance of counsel. He argues that he was entitled to post-conviction relief based upon counsel's shortcomings in failing to object to hearsay evidence and leading questions, failing to request a mistrial, failing to present evidence and impeach witnesses, and failing to raise issues on appeal.

Failing to Object to Hearsay and Leading Questions

The petitioner contends that trial counsel's performance was deficient in failing to object at two points to Ms. Woods's testimony that the victim told her earlier on the day he was killed that the petitioner had words with him about the victim wearing red. He argues these statements were hearsay and were prejudicial because they identified the petitioner as the person who killed the victim and implicated the petitioner in gang activity. He also argues that counsel failed to object to the leading questions which solicited the hearsay evidence about his having been the person who shot the victim.

The trial court found that the objections would have been proper and would have been sustained. However, the court also found that the petitioner had not been prejudiced because there was also evidence that Ms. Woods heard the petitioner declare before the shooting his intent to kill someone wearing red and his admission in her presence after the shooting that he shot the victim. On review, we are unpersuaded of error in the trial court's conclusion that although these objections were pertinent, the petitioner was not prejudiced by counsel's failure to make them in view of the other evidence implicating him in the crime and in gang activity. We note, as well, that the petitioner's complaints about leading questions would have resulted in questions being posed differently to the witness, with the information ultimately gaining admission. Further, the petitioner did not dispute at trial that he shot the victim, and any leading questions about his admission to Ms. Woods that he shot the victim were not prejudicial to his self-defense theory.

Failure to Request a Mistrial

The petitioner contends that counsel was ineffective in failing to request a mistrial at several junctures. He contends that counsel was deficient in failing to make a mistrial request: (1) following Ms. Woods's testimony that the victim told her about the words exchanged between himself and the petitioner about the victim wearing red, (2) when Ms. Woods testified that she understood the significance of the victim's wearing red, and (3) following the testimony of Ms. Woods and Ms. Page about the petitioner's prior bad acts.

The trial court found that the testimony about the victim wearing red was not prejudicial because Ms. Woods was not permitted to explain what her understanding of this was. It found that because the victim was the only person wearing red the night of the shooting, the jury more likely inferred that the petitioner's statement about the victim's wearing red was related to specific animosity the petitioner had for the victim, rather than gang affiliation. The court also found that the evidence of the petitioner's prior bad acts was insignificant because Ms. Page testified that the choking incident was a minor altercation and Ms. Woods's testimony about the robbery was cut short by an objection, which was sustained. The court ruled that the petitioner had not been prejudiced by counsel's failures to request a mistrial.

Normally, a mistrial should be declared only if there is a manifest necessity for such action. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The trial court was unpersuaded

that the petitioner had proven that had counsel moved for a mistrial, he would have obtained relief. The trial court did not err in this determination. There was evidence of the petitioner's own declaration that he was going to kill someone wearing red. The evidence supports the trial court's findings about the effect of the petitioner's other bad acts. The trial court did not err in denying post-conviction relief on the basis of failure to request a mistrial.

Failure to Investigate, Present Evidence, and Impeach Witnesses

First, the petitioner contends that trial counsel failed to present proof that the victim's fingerprints were identified from a beer bottle found at the scene and that counsel failed to cross-examine witnesses about whether the victim had been drinking. The trial court found that this evidence would have been "highly relevant" but that the petitioner failed to demonstrate prejudice given the evidence that the victim was shot from a distance in the back, suggesting that the victim was not close enough to hit the petitioner with a bottle. The court also found that the failure to impeach the witnesses who testified that the victim had not been drinking was not prejudicial because there was expert evidence of the victim's elevated blood alcohol level and of cocaine metabolites in his body.

The petitioner has not carried his burden of demonstrating error in the trial court's ruling. There was evidence that the victim had been drinking, both from an eyewitness and the medical examiner. There was evidence of a beer bottle found at the scene, and there was eyewitness proof that the victim hit the petitioner with the beer bottle before the shooting. Despite the fact that trial counsel could have placed the beer bottle in the victim's hand at some point through the fingerprint evidence, there was other evidence before the jury that the victim was drinking and that the victim hit the petitioner with a bottle.

Next, the petitioner contends that the trial court erred in denying relief on the basis that counsel failed to discover and to cross-examine Ms. Woods about her prior conviction for aggravated assault. The trial court found that when trial counsel attempted at trial to recall Ms. Woods to cross-examine her about the conviction, the court had ruled that the conviction was not admissible for impeachment purposes. The record contains the transcript of the trial, which reflects that the trial court ruled that the conviction was not relevant to the witness's credibility and that the defense could not recall the witness. See Tenn. R. Evid. 609(a) (providing for impeachment of a witness by evidence of conviction of a crime for the purpose of attacking the witness' credibility). The petitioner has not carried his appellate burden of demonstrating the error of the trial court, either during the trial proceedings or the post-conviction proceedings.

The petitioner also contends that trial counsel failed to impeach Ms. Woods's testimony that she heard the petitioner say he was "sorry" for the crime. He asserts counsel should have presented evidence of Ms. Woods's prior statement to Mr. Wells that she did not witness the shooting but heard that the petitioner shot the victim after the victim and petitioner argued and the victim hit the petitioner with a beer bottle. The petitioner argues that this impeachment evidence would have supported his self-defense theory at trial and that counsel was ineffective in failing to present it. The

trial court ruled that the petitioner failed to carry his burden of proof on this issue. The court noted the absence of Ms. Woods's testimony at the post-conviction hearing and declined to speculate what effect, if at all, any inconsistencies might have had on the verdict. The court likewise noted that any apparent inconsistencies might have had "reasonable explanations." The petitioner has offered no convincing argument that the trial court's ruling was in error on this point. We hold that the petitioner is not entitled to relief on the basis of this alleged shortcoming of counsel.

Appellate Representation

Finally, the petitioner contends that trial counsel was ineffective on direct appeal for failing to raise appellate issues. He lists in his brief the following issues:

- (1) a failure to cite as error the trial court's ruling that Ms. Woods' conviction for aggravated assault was inadmissible;
- (2) the sufficiency of the convicting evidence;
- (3) the "other crimes" 404(b) testimony of Ms. Woods involving an aggravated robbery;
- (4) the hearsay statements of Ms. Woods that Mr. Waters was the shooter;
- (5) the "other crimes" 404(b) testimony of Ms. Page involving an aggravated assault;
- (6) evidence regarding the fingerprint of the victim on the beer bottle, which would have been relevant to the sufficiency of the evidence;
- (7) the credibility of Ms. Woods' testimony based upon her prior inconsistent statements;
- (8) the viability of a mistrial in light of inadmissible 404(b) evidence.

The trial court found that although some of counsel's actions had been deficient, the petitioner had failed to prove that he had been prejudiced by any shortcomings of counsel.

On appeal, the petitioner has made no argument specific to any of his trial counsel's alleged appellate shortcomings and the effect on the outcome of the conviction proceedings. Further, we see no different result had these issues been raised on direct appeal. The petitioner failed to carry his burden of proving that he was entitled to post-conviction relief based upon his claim of ineffective assistance of counsel on appeal.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE